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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. RICK DAVE DESHON, Defendant and Appellant.	C061941 (Super. Ct. No. 62-083877)

Defendant Rick Deshon stipulated that he had a prior theft conviction; a jury thereafter convicted him of petty theft. He admitted two recidivist allegations. The trial court sentenced him to state prison.

On appeal, defendant contends that in the context of the theory of his case -- which admixed involuntary unconsciousness *and* voluntary intoxication -- the court erroneously instructed the jury that voluntary intoxication was not a "defense" and as a result precluded the jury from considering whether his intoxication prevented him from forming the necessary specific intent for his crime. We shall affirm the judgment.

FACTS

The underlying circumstances are not complex. The clerk in a convenience store watched defendant collect various snacks and an 18-pack of beer and then walk out the door without paying for them. After locking up the cash register, the clerk intercepted him outside and ordered him to stop. The clerk took a step back when defendant dropped everything on the ground, fearing that defendant might take a swing at him, but defendant only made "an irritated growl like I was bothering him" without saying anything else. Defendant walked away; the clerk collected the merchandise, went back into the store, and called 911. Deputies responded about five minutes later. After a brief search of the area, they took the clerk to a motorcycle shop next door, where he identified the detained defendant as the shoplifter.

Defendant had an unsteady gait and the odor of alcohol about him, his speech was slightly slurred and his eyes were "glossy and bloodshot," but he seemed able to walk and talk. There also were marks on defendant's face. The arresting deputy thought defendant was sufficiently drunk that he posed a danger to himself or others. Defendant had two 18-packs of beer with him in the parking lot; two or three cans were missing. He said he had bought them at a supermarket two to three miles down the road, and had paid $40 for them. He denied ever being in the convenience store, and said he was sitting next to the motorcycle shop because he wanted a quiet place to drink his beer.

Defendant testified. A friend had bought a gallon of vodka the morning of the shoplifting, and he and defendant drank most of it by late afternoon before they walked to a nearby park. When someone questioned him about his ankle monitor, defendant admitted being a registered sex offender. One of the other park users came at defendant aggressively, saying he did not want defendant's type around the park. When defendant objected to the man's demands that he leave, the man began to punch and body-slam defendant. Defendant incurred scrapes to his head and bruised ribs as a result. The last thing defendant recalled before the deputy found him in the parking lot of the motorcycle store was walking away from the park across a bridge. He did not have any independent recollection of the shoplifting incident later that evening.

After defendant testified, defense counsel requested an instruction on involuntary unconsciousness based on the blows to his head. The court ruled that it would grant the request for an instruction on unconsciousness; defense counsel assented to the text of the proposed instruction. Defense counsel also assented to the text of a proposed instruction on voluntary intoxication.

Consequently, the court instructed the jury as follows with regard to these two instructions: "To prove that the defendant is guilty of [petty theft], the People must prove that: [¶] . . . [¶] [w]hen the defendant took the property, he intended to deprive the owner of it permanently . . . . [¶] . . . [¶] You may consider evidence . . . of the

defendant's voluntary intoxication *only in a limited way*. You may consider that evidence only in deciding . . . *whether the defendant acted with an intent to permanently deprive the owner of the property*." (Italics added.) After defining voluntary intoxication, the instructions reasserted that "the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to permanently deprive the owner of [the] property. If the People have not met this burden, you must find the defendant not guilty of theft. *You may not consider evidence of voluntary intoxication for any other purpose*." (Italics added.) "The defendant is not guilty of theft if he acted while legally unconscious. Someone is legally unconscious when he is not conscious of his actions . . . even though able to move. Unconsciousness may be caused by a blow to the head. *However, voluntary intoxication causing unconsciousness is not a defense, although*[] *you may consider intoxication in determining whether the defendant formed the specific intent to permanently deprive the owner of property*." (Italics added.)

In his closing argument, the prosecutor first argued that defendant was not drunk enough to prevent him from forming an intent to deprive the convenience store permanently of property. "[P]eople do stupid things when they drink. It doesn't mean they don't intend to do it at the time. There's a difference between an effect on somebody's judgment and somebody who is completely . . . passed out or in a complete stupor . . . where they can't form intentions." The prosecutor relied on evidence

that defendant "was able to navigate his way up . . . from . . . where . . . he got the other two 18-packs of beer . . . . It's about 3/4 of a mile away. The defendant had the cognitive ability to locate a store where alcohol is . . . [and] locate the alcohol in the store[, and h]e was able to use the rest room"; the "cagey" manner in which defendant attempted to evade the clerk in the convenience store; and his recognition that he had to leave the scene of his actions. Turning to the subject of an unconsciousness defense, the prosecutor asserted that it must have its basis in a blow to the head and *not* voluntary intoxication; "*[s]o if the defendant got so drunk that he was unconscious and is walking through that store and stealing, that's not a defense*." (Italics added.) The prosecutor cited defendant's ability to respond coherently to questioning immediately after the shoplifting as evidence he was conscious during the shoplifting.

Defense counsel initially connected the relevance of defendant's aggravated level of inebriation to the specific intent of depriving an owner of property. He then cautioned the jury that unconsciousness does not require a stupor, merely a lack of an awareness of acting (citing the example of sleepwalkers), and pointed out that defendant only growled when the clerk stopped him, and could not manage to get any farther than the wall of the neighboring business.

In rebuttal, the prosecutor again distinguished between the two theories. He reiterated that defendant was not in any

sort of walking coma from the scrapes on his head, nor was he so drunk he could not form the intent to steal.

DISCUSSION

Seizing upon the "strikingly broad language" we quoted above in the instructions that "voluntary intoxication causing unconsciousness is 'not a defense,'" and isolating that part of the prosecutor's argument in which he asserted, "[s]o if the defendant got so drunk that he was unconscious and is walking through the store and stealing, that's not a defense," defendant posits a strained reading under which the jurors would believe that they could consider intoxication but could not base an acquittal on it. As a result, he was deprived of a defense in violation of his rights under the federal Constitution.

We first reject the People's oft-repeated suggestion that defendant invited the error because trial counsel acquiesced in the wording of the instruction. The doctrine of invited error, however, applies only where the record allows us to impute an exercise of *reasoned tactics* to defense counsel rather than ignorance or mistake in taking a deliberate action, and we do not seize upon some conceivable tactical purpose that was not in fact a part of defense counsel's considerations. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49; *People v. Boyette* (2002) 29 Cal.4th 381, 438; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1234; *People v. Wickersham* (1982) 32 Cal.3d 307, 333-334.) If the instructions suffered the flaw defendant now proposes, we could not impute any exercise of reasoned tactics to support it. We therefore cannot find invited error.

It is true, as defendant points out, that *People v. Spencer* (1963) 60 Cal.2d 64 asserted that "trial jurors should not be required to make . . . an intricate analysis" (*Spencer, supra,* at p. 87) of instructions that correctly explained 1) an offense required specific intent, 2) drunkenness is not of itself a defense, and 3) drunkenness could nonetheless be taken "'into consideration'" in determining whether a defendant had the necessary intent for a crime (*id.* at pp. 86-87 & fn. 14 [finding error to give such instructions with crimes of specific intent, but no prejudice in the case before it because evidence of drunkenness insufficient]).

However, the governing standard under which we presently evaluate a claim of instructional error is whether it is reasonably likely (in light of the entire charge) that a jury would have given a defendant's suggested interpretation to an instruction. (*Boyde v. California* (1990) 494 U.S. 370, 378, 380 [108 L.Ed.2d 316]; *People v. Kelly* (1992) 1 Cal.4th 495, 525.) We thus do not concern ourselves with whether a particular meaning can be "teased out" of instructions. (*People v. Avena* (1996) 13 Cal.4th 394, 417.) In determining the reasonable likelihood of a suggested interpretation, we may consider the arguments of counsel. (*Kelly, supra,* 1 Cal.4th at pp. 526-527; *People v. Cuevas* (2001) 89 Cal.App.4th 689, 699.)

Defendant's instructional interpretation here is unreasonable. Both the highlighted instruction and argument make the proper point that the defense of unconsciousness must be the result of the alleged blows in the park, not voluntary

drunkenness. No reasonable juror, having also been instructed that voluntary drunkenness can negate the necessary specific intent for theft, would interpret the prohibition against use of voluntary drunkenness causing *unconsciousness* in support of a defense as prohibiting consideration of whether drunkenness in fact prevented defendant from forming a specific intent. We do not find any error.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

RAYE, J.